92-1200

No. 92-

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

SUN COMMUNICATIONS, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and

UNITED STATES OF AMERICA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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96-P

QUESTIONS PRESENTED

1. Where an application to the FCC is dismissed solely for failure to comply with a regulation and the applicant challenges the validity of that regulation, both before the FCC and the Court of Appeals, can the dismissal be summarily affirmed by the Court without either the FCC or the Court addressing the question of the validity of the regulation?

2. What standards govern the right of Courts of Appeals to summarily dispose of appeals?

3. Is 47 C.F.R. Sec. 22.923(b)(7), which requires an applicant to sign a certification subjecting him or her to the penalties of perjury for filing an incomplete application, a valid and enforceable federal regulation?

4. Does the D.C. Circuit have the power to grant the FCC discretion to adopt a regulation which exceeds the rule making authority delegated to the agency by the Congress?

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. Petitioner has no parent company and no subsidiaries.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Constitution of the United States, Amendment 5:

* * * nor be deprived of life, liberty, or property, without due process of law; * * *

47 U.S.C. Section 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall-

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, * * *

Constitutional Provisions, Statutes and Regulations Involved In This Case (Cont.)

18 U.S.C. Sec. 1621. Perjury generally

Whoever -

* * *

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully suscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement of subscription is made within or without the United States.

Constitutional Provisions, Statutes and Regulations Involved In This Case (Cont.)

28 U.S.C. Sec. 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of

28 U.S.C. Sec. 1746 (Cont.)

such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

Constitutional Provisions, Statutes and Regulations Involved In This Case (Cont.)

28 U.S.C. Sec. 2347 Petitions to review; Proceedings

* * *

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall -

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; * * *

Constitutional Provisions, Statutes and Regulations Involved In This Case (Cont.)

47 C.F.R. Sec. 22.923 Content and Form of Rural Service Area applications.

* * *

(b) Applications for construction permits for initial cellular systems for Rural Service Areas shall be filed as set forth below:

* * *

(7) All applicants must certify to the following on the Transmittal Sheet:

CERTIFICATION

I hereby certify, under penalties of perjury, this application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to

47 C.F.R. Sec. 22.923(b)(7) (Cont.)

be incorrect, this application shall be dismissed without further consideration.

I also certify the applicant is the real party in interest in this application and there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest. It is also certified that the (sic) applicant intends to construct and operate the station as proposed and that there are no agreements or understandings that are inconsistent with that intent.

I declare, under penalties of perjury, that I am the authorized representative of the above-named applicant in the above en

47 C.F.R. Sec. 22.923(b)(7) (Cont.)

titled matter, that I have read the foregoing certification; and the matter and things therein stated are true and correct.

Executed on

--[date] _____

--Signature _____

Type/Print Name _____

Type/Print Title _____

All persons signing the Certification must do so using ink. No mechanical reproduction of signatures may be used.

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SUN COMMUNICATIONS, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and

UNITED STATES OF AMERICA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sun Communications, Inc. (Sun) respectfully petitions for a writ of certiorari to review the Order of the United States Court Of Appeals For The District Of

Columbia Circuit. That court summarily affirmed an order of the Federal Communications Commission dismissing Sun's application for a cellular telephone system to serve the North Dakota 2-Bottineau Rural Service Area because of Sun's failure to sign the certification required by 47 C.F.R. Sec. 22.923(b)(7). In doing so neither the FCC nor the court addressed Sun's contention that the regulation is invalid.

OPINIONS AND ORDERS BELOW

The Order of the D.C. Circuit affirming the dismissal of Sun's application is unpublished and is reproduced in the Appendix, infra, at page 1a. The decision of the FCC affirming the Common Carrier Bureau's dismissal of Sun's application is reported as Sun Communications, Inc., 6 FCC Rcd 5966 (1991), and is reproduced in the Appendix, infra, at page 4a. The

decision of the Chief, Common Carrier Bureau, denying reconsideration of an earlier decision dismissing Sun's application is reported as Sun Communications, Inc., 5 FCC Rcd 2891 (Com. Car. Bur. 1990), and is reproduced in the Appendix, infra, at page 14a. The earlier decision of the Chief, Common Carrier Bureau is reported as Sun Communications, Inc., 4 FCC Rcd 6429 (Com. Car. Bur. 1989), and is reproduced in the Appendix, infra, at page 31a.

JURISDICTION

The Order of the United States Court of Appeals For the District of Columbia Circuit from which review is sought was entered on July 31, 1992. Rehearing was denied on October 16, 1992 (App. 54a). This Court has jurisdiction to review the Order in this case by writ of certiorari under 28 U.S.C. Sec. 2350(a).

STATEMENT OF THE CASE

Sun won the FCC's North Dakota 2 cellular lottery but its application was initially found to be unacceptable because it had filed the wrong size map. On reconsideration the Common Carrier Bureau accepted Sun's map and said that ordinarily it would grant the application, but instead dismissed it solely because of the discovery that Sun's president had failed to sign the "letter perfect" certification on the Commission's form transmittal sheet (App. 31a-53a). Sun acknowledged that it had failed to sign the certification but offered to show that it had signed it in all 427 other rural lotteries. Contending that its failure to sign in this one instance was inadvertent and immaterial, Sun sought a waiver of the certification requirement, which was denied (App. 14a-30a). Sun then challenged the lawfulness of the certification which is required by

Sec. 22.923(b)(7) of the Commission's Rules, 47 C.F.R. Sec. 22.923(b)(7).

The first paragraph of 47 C.F.R. Sec. 22.923(b)(7) states:

> "I hereby certify, under penalties of perjury, this application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further consideration."
> (47 C.F.R. Sec.22.923(b)(7), supra, p.xiii)

Sun contended that the certification is contrary to law because the filing of an incomplete application is not a proper basis for invoking the penalties of perjury, that a person cannot be made subject to the penalties of perjury simply for a mistake or omission, and that the Commission cannot require an applicant to certify that he or she will be subject to the

penalties of perjury merely because his or her application is not complete in every respect.

Sun showed that the certification required by Sec. 22.923(b)(7) is contrary to two federal statutes, 28 U.S.C. Sec. 1746, which mandates that the form of a certification under penalty of perjury shall be that the matter is "true and correct", (supra, p. x-xi) and 18 U.S.C. Sec. 1621, which defines perjury to be certifying that a matter is true which you do not believe to be true (supra, p. ix).

In denying Sun's waiver request the Common Carrier Bureau had acknowledged, albeit in a different context, that the certification does not deal with truth, in footnote 1 of Sun Communications, Inc., 5 FCC Rcd 2891 (Common Carrier Bureau 1990), (App. 14a) where it distinguished the certification on the transmittal sheet from the certification which appears at

the end of the cellular application form. The Bureau there stated:

> "That certification [at the end of the cellular application form] is a general statement that statements made in the application are `true, complete and correct to the best of his (her) knowledge and belief, and are made in good faith.' The basic purpose of that certification is to verify the truthfulness of statements in the application. In contrast, the certification as to completeness contained on the transmittal sheet has the purpose of verifying that the applicant in question has reviewed the application and that it is complete in every respect,...". (5 FCC Rcd at 2892-2893)(App. 29a-30a).

Sun contended that since it is not a certification to truth, the completeness certification in 47 C.F.R. Sec. 22.923(b)(7) cannot lawfully be under penalty of perjury, and since the certification is contrary to law, Sun's application cannot be dismissed for its failure to sign the transmittal sheet certification.

Sun also pointed out that the general

declaration under penalties of perjury at the end of C.F.R. Section 22.923(b)(7) does not cure the legal defect in the completeness certification because it does not undo the earlier defective certification, it merely compounds it. A fair reading of the first certification and the last one together is that the applicant declares under penalties of perjury that it is true that he or she certifies under penalties of perjury that the application is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. The completeness certification under penalties of perjury there is just as defective legally as it is when it is standing alone.

In its decision upholding the Common Carrier Bureau's dismissal of Sun's application (App. 4a) the Commission did not

address Sun's challenge to the lawfulness of the certification. Instead, it found that the question had been raised too late in the proceeding (in fact, it was raised before the case reached the Commission itself) on the basis of 47 C.F.R. Sec. 1.106, which on its face applies only to questions of fact, not law, and a quotation taken out of context from Coalition for the Preservation of Hispanic Broadcasting v. FCC, 931 F2d 73 (D.C. Cir. 1991), which involved the doctrine of exhaustion of administrative remedies, not applicable to Sun's case.

The Commission did remark that whether or not the language of the certification could serve as the basis for a perjury conviction is irrelevant to the ability of the Commission to dismiss an application for failure to comply with the certification requirement, and that neither of the statutes cited by Sun as

being in conflict with the certification states or even suggests that an agency certification requirement would be unenforceable by the agency simply because it might not sustain a perjury conviction. Sun Communications, Inc., 6 FCC Rcd 5966, 5967 (1991) (App. 11a-12a).[1]

The Commission rejected Sun's claim that the completeness certification is invalid, but its actions belie its words. After considering Sun's case for sixteen months, three days before its decision the Commission deleted the offending words

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1. It should be noted that in discussing another criminal statute, 18 U.S.C. Sec. 1304 pertaining to lotteries, this Court stated: "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. ...[The Commission's construction] would do violence to the well established principle that penal statutes are to be strictly construed." F.C.C. v. American Broadcasting Co., 347 U.S. 284, 296 (1954).

"under penalties of perjury" from its completeness certification for the next round of cellular applications. Compare 47 C.F.R. Sec. 22.923(b)(7) and 47 C.F.R. Sec. 22.924(c)(1)(i).

Sun appealed the Commission's ruling to the D.C. Circuit Court of Appeals where the Commission moved for summary affirmance and Sun responded with a countermotion for summary reversal, again challenging the lawfulness of the certification required by 47 C.F.R. Sec. 22.923(b)(7). In its Order disposing of the case the D.C. Circuit stated that: "The merits of the parties' positions are so clear as to justify summary action", denied the motion for summary reversal, and granted the motion for summary affirmance on the ground that "The appellee properly dismissed appellant's application because appellant's president did not sign the certification statement as required by FCC

Rule 22.923(b)(7), 47 C.F.R. [Sec.] 22.923(b)(7)." (App. 1) The Court did not address Sun's contention that 47 C.F.R. Sec. 22.923(b)(7) is contrary to law and invalid.

REASONS FOR GRANTING THE WRIT

1. THE FAILURE OF THE D.C. CIRCUIT TO ADDRESS THE QUESTION OF THE VALIDITY OF 47 C.F.R. SEC. 22.923(b)(7) DEPRIVES SUN OF ITS STATUTORY RIGHT OF COURT REVIEW AND DUE PROCESS OF LAW.

Sun has a statutory right to court review of the dismissal of its application by the FCC under 47 U.S.C. Sec. 402(a), which incorporates the procedures of Chapter 158 of U.S.C. Title 28. 28 U.S.C. Sec. 2347 sets forth the proceedings to be followed on a petition for review. Subparagraph (b) provides that when a hearing

is not required and there is no genuine issue of material fact presented, the Court of Appeals shall "pass on the issues presented". (See p. xii above).

In this case no hearing is required and no genuine issue of material fact is presented, as is evidenced by the fact that both parties moved for summary decision. The issue of the validity of 47 C.F.R. Sec. 22.923(b)(7) was repeatedly presented in the case and its resolution is essential to the decision. The D.C. Circuit's Order expressly relies on Sun's violation of the regulation but does not address Sun's contention that the regulation is invalid. The D.C. Circuit has failed to "pass on the issues presented", thus depriving Sun of the review it is entitled to under the statute.

The D.C. Circuit's failure to address in its decision the issue of the validity of the regulation at issue also deprives

Sun of due process of law. Fundamental to the right of a party to appeal from a decision below is the right to challenge the lawfulness of a rule or regulation which has been applied against him, and to have the appellate court rule on that challenge. An appellate court should not be permitted to invoke summary proceedings to avoid ruling on an issue of law properly raised before it.

We do not contend that where an agency has addressed a question of law raised by a party and has properly disposed of such question, the court cannot dispose of an appeal summarily. But we do contend that where, as here, an agency has not addressed a question of law raised before it, and the question is again raised on appeal, the court cannot summarily affirm the agency decision without addressing that question of law. For the court to do so is to deny the appellant

his day in court on appeal. It should be noted that while the court has somehow affirmed the action of the FCC in this case, it does not adopt any of the FCC's statements about 47 C.F.R. Sec. 22.923(b)(7). Does this Court understand how the D.C. Circuit resolved the question of the validity of that regulation? Sun does not. Sun submits that appellate due process of law entitles it to a ruling on the validity of the regulation it is charged with violating. So far it has not been able to obtain such a ruling from either the FCC or the court.

2. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO SET STANDARDS FOR THE SUMMARY DISPOSITION OF APPEALS IN THE CIRCUIT COURTS OF APPEALS.

While the right of an appellant such as Sun to court review is statutory, the

summary disposition of appeals is a procedure which does not appear to have any specific statutory basis. It is a practice which has developed out of necessity as a result of the increasing volume of cases flooding the federal courts. It does not appear that this Court has ever addressed the question of when summary disposition of an appeal is appropriate and when it is not, and how the statutory and due process rights of parties are to be protected when summary proceedings are adopted.

For example, the case law in the D.C. Circuit regarding summary disposition of cases indicates that summary proceedings means dispensing with the record on appeal, full briefing, and oral argument. (See, e.g. Cascade Broadcasting Group Ltd. v F.C.C., 822 F.2d 1172, 1174 (D.C. Cir. 1987); Walker v. Washington, 627 F.2d 541, 542 (D.C. Cir. 1980); Sills v. Bureau of

Prisons, 761 F.2d 792, 793 (D.C. Cir. 1985).) There is no suggestion in any of these cases that summary proceedings means that the court will not address and resolve all the issues in the case in its ruling on the motions for summary disposition. On the contrary, all the cases show the court going to great lengths to address every issue raised in the court and below. Yet in this case the court has not even acknowledged that the principal issue in the case was even raised. This Court should clarify what is meant by summary procedures and when and how summary procedures can appropriately be used by the Circuit Courts of Appeals. As this case indicates, there is need for guidance in this area.[2]

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2. An inquiry to the Administrative Office of the United States Courts revealed that no statistics are kept on the number or percentage of cases resolved by summary proceedings. A random check of recent volumes of Fed Second shows tables of hundreds of cases in the category of

3. 47 C.F.R. SEC. 22.923(b)(7) EXCEEDS THE RULEMAKING AUTHORITY OF THE FCC BECAUSE IT IS INCONSISTENT WITH LAW; THUS IT IS NOT A VALID REGULATION AND SUN'S APPLICATION CANNOT BE DISMISSED FOR FAILING TO COMPLY WITH IT.

Sun challenged the validity of 47 C.F.R. Sec. 22.923(b)(7) both before the FCC and before the D.C. Circuit. The standard of review to be employed in resolving a challenge to an agency rule is well established. In Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), this Court stated: "It is axiomatic that an administrative agency's power to promulgate legislative regulations is

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"Decisions Without Published Opinions", See, e.g., 970 F.2d 895-901 (1992), 960 F.2d 143-157 (1992), the great majority of which are affirmances of decisions below, but how many of these are by summary decision there is no way of knowing.

limited to the authority delegated by Congress." 488 U.S. at 208. Thus, to determine whether the FCC has the power to promulgate Sec. 22.923(b)(7), the Court must examine the authority delegated to the Commission by Congress to adopt regulations.

47 C.F.R. Sec. 22.923(b)(7), the "letter perfect" certification for rural cellular applications which is at issue here, is a combination of two separate certifications found in 47 C.F.R. Sec. 22.913(b)(3), which was the original cellular "letter perfect" certification adopted by the Commission as part of a rule making proceeding. See Cellular Radio Service (Lottery Selection), 101 F.C.C.2d 577, 606; 58 Pike & Fischer RR 2d 677 at 695, 696 (1985).

The Commission's authority from Congress for the issuance of rules and regulations is contained in Sections 4(i),

4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 303(r). 47 U.S.C. Sec. 303 "Powers and Duties of Commission" in subsection (r) limits the Commission to the adoption of rules and regulations "not inconsistent with law". (See p. viii, above.)

The certification required by Sec. 22.923(b)(7) is inconsistent with two federal statutes. 28 U.S.C. Sec. 1746 mandates that the form of a certification under penalty of perjury shall be that the matter is "true and correct" (See p. x, above). 18 U.S.C. Sec. 1621 defines perjury to be certifying that a matter is true which the person certifying does not believe to be true. (See p. ix, above). The first paragraph of the Commission's certification does not deal with truth but with the objective question whether the application is complete in all respects

and contains all the information required. Thus, the regulation is inconsistent with law and exceeds the rulemaking authority delegated to the FCC by Congress.

In Bowen, supra, this Court stated that a rule not in keeping with a Congressional authorization was "invalid" (488 U.S. at 216). Since 47 C.F.R. Sec. 22.923(b)(7) is invalid, Sun's application cannot be dismissed for failing to comply with it.

In its Order (App. 1a) the D.C. Circuit does not address the validity of 47 C.F.R. Sec. 22.923(b)(7), but appears to equate that regulation with other "hard nosed rules" it has previously held the FCC has the discretion to adopt, in view of an expected flood of applications and the Commission's limited resources. Hard nosed rules are one thing, but a rule which exceeds the authority delegated to the FCC by the Congress is another. Does

the D.C. Circuit have the power to grant the FCC discretion to adopt a regulation which exceeds the authority delegated by Congress? Sun submits that it does not, that 47 C.F.R. Sec. 22.923(b)(7) exceeds the authority delegated to the FCC by Congress, and that the D.C. Circuit's Order upholding that regulation, sub silentio, constitutes an unconstitutional extension of the power of that court into which this Court should inquire.

CONCLUSION

Petitioner Sun Communications, Inc. respectfully submits that the Court should grant certiorari in this case and either (1) reverse the decision of the D.C. Circuit on the ground that 47 C.F.R. Sec. 22.923(b)(7) is not a valid regulation; or (2) remand the case to the D.C. Circuit for a decision on the validity of 47 C.F.R. Sec. 22.923(b)(7); or (3) exercise

its supervisory authority over the federal courts by using this case to address the question of what the standards should be for summary disposition of appeals, and what the limits of the power of the Courts of Appeals are with respect to granting an agency discretion to exceed the rule making authority delegated by Congress.

Respectfully submitted,

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January 14, 1993

APPENDIX

Appendix

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3.	Memorandum Opinion And Order dated May 7, 1990, Chief, Common Carrier Bureau, Federal Communications Commission.	14a
4.	Memorandum Opinion And Order dated August 17, 1989, Chief, Common Carrier Bureau, Federal Communication Commission.	31a
5.	Order on Rehearing dated October 16, 1992, United States Court of Appeals for the District of Columbia Circuit.	54a

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1548 September Term, 1991

Filed July 31, 1992, Constance L. Dupre, Clerk

SUN COMMUNICATIONS, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents

BEFORE: Wald, Silverman and Randolph, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition

thereto, and the reply; and the motion for summary reversal, the opposition thereto, and the reply it is

ORDERED that the motion for summary reversal be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to justify summary action. See Cascade Broadcasting Group, Ltd, v, FCC, 822 F.2d 1172, 1174, (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The appellee properly dismissed appellant's application because the appellant's president did not sign the certification statement as required by FCC Rule 22.923(b)(7), 47 C.F.R. Sec.

22.923(b)(7). cf. Florida Institute of Technology v. FCC, 952 F.2d 549, 550 (D.C. Cir. 1992) (observing that the court has "consistently approved the FCC's hard-nosed rules" so long as applicants are given explicit notice of all applicable requirements); Salzer v. FCC, 778 F.2d 869, 873 (D.C. Cir. 1985) (FCC has discretion to enact strict "complete and sufficient" standard for accepting lottery applications for low power television original broadcast licenses, as opposed to the usual "substantially complete" standard, in light of expected flood of applications and Commission's limited resources).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

Before the

Federal Communications Commission

Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS, INC.

File No. 10232-CL-P-581-A-88

For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 581, North Dakota 2-Bottineau

MEMORANDUM OPINION AND ORDER

Adopted: October 10, 1991;

Released: October 21, 1991

By the Commission:

I. INTRODUCTION

1. In this order, we address a "Second Petition for Further Reconsideration" filed by Sun Comunications, Inc. (Sun).(1) Sun seeks reversal of an order released by the Common Carrier Bureau reaffirming the Bureau's prior ruling that Sun's failure to sign the certification required by Section 22.923(b)(7) of our rules justified the dismissal of Sun's application. Sun argues that the required certification, which is printed on the transmittal sheet for its application, is unlawful on its face and therefore that failure to sign it cannot ber a proper basis for the dismissal of Sun's application. For the reasons stated in this order we dismiss Sun's most recent petition.

II. BACKGROUND

2. Sun won the non-wireline lottery for the North Dakota 2-Bottineau Rural Service Area (RSA), Market No. 581. Initially, the Mobile Services Division dismissed Sun's application as unacceptable for filing because Sun failed to submit a full-size 1:250,000 scale map as required by Section 22.903(a) of the COmmission's rules. Subsequently, in Sun Communications, Inc., 4 FCC Rcd 6429 (Com. Car. Bur. 1989) (Bureau Order), the Common Carrier Bureau (Bureau) dertermined that since Sun's 1:500,000 scale map submitted after the lottery with its paper original application was legible, with clear latitude, longitude, and scale markings depicted on its face, the improper map scale did not render the application unacceptable for filing under Section 22.20 of the rules. Nevertheless, the Bureau Order

dismissed Sun's application because Sun had not signed the certification statement printed on the transmittal sheet which was filed with its intial (microfiche) application. Thus, Sun's aplication was dismissed for failure to comply with the Commission's "letter perfect" standard. See, e.g., Satellite Cellular Systems, 5 FCC Rcd 1758 (1990).

3. Sun then filed a "Petition for Further Reconsideration or for Waiver of the Commission's Rules," requesting that the Bureau either reinstate its application or waive the certification requirement. The Bureau reaffirmed its prior ruling that failure to comply with the Commission's letter perfect requirements results in the dismissal of initial cellular appplications subject to lotteries, no matter when the defect is discovered, and found that Sun had not presented sufficient grounds to waive the certification requirement of

the "letter perfect" standard. Sun Communications, Inc., 5 FCC Rcd 2891 (Com. Car. Bur. 1990) (Further Reconsideration Order).

4. Sun has filed a "Second Petition for Further Reconsideration," claiming that the certification printed on the transmittal sheet is unlawful on its face and that, therefore, Sun's failure to sign that certification cannot be a proper basis for the denial or dismissal of its application.

5. Sun observes that the first paragraph of the printed certification states:

> I hereby certify, under penalties of perjury, this [sic] application for an initial cellular authorization is complete in every respect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules. I acknowledge that if, upon Commission inspection, this certification is shown to be incorrect, this application shall be dismissed without further con-

sideration.

Sun argues that the Commission cannot lawfully require an applicant to sign a certification whcih makes the applicant subject to the penalties of perjury pursuant to 18 U.S.C. Section 1621(2) simply for submitting an incomplete application. In this regard, Sun observes that 28 U.S.C. Section 1746 prescribes a specific form for making unsworn declarations under penalty of perjury in lieu of affidavits or sworn declarations. Subsection (2) of the referenced section contains the required language for such an unsworn declaration executed within the United States. The language is: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." Given the foregoing language, Sun argues, the proper form for a certification under penalty of perjury must include language

stating that the matter asserted is true and correct.

6. Sun asserts that the first paragraph of Section 22.923(b)(7) of our rules, which is the source of the certification language on the transmittal sheet for RSA applications, is not in the form prescribed by 29 U.S.C. Section 1746. Further, Sun claims, the legal basis for invoking the penalties of perjury under 18 U.S.C. 1621(2), namely, that the applicant has willfully subscribed as true a material matter which he does not believe to be true, cannot possibly apply because the applicant has not subscribed anything to be true. Sun cites several cases for the principal that an accused person is guilty of perjury only if he can be shown to have been aware that he was making false statements. Sun notes that the third paragraph of the certification contains the correct language for a declara-

tion under penalties of perjury, namely: "I declare, under penalties of perjury, that . . . the matter and things therein stated are true and correct." Nevertheless, Sun claims that the declaration in the third paragraph does not cure the defect in the certification contained in the first paragraph. Thus, Sun concludes, the entire certification is unlawful.

III. DISCUSSION

7. Sun has provided no explanation of why it waited until its second petition for reconsideration of the Bureau's action to raise its allegations regarding the specific language of the certification. Nor do we find any public interest reasons for considering these new matters at this late stage of the proceeding. Accordingly, we are dismissing Sun's petition. See 47 C.F.R. Section 1.106(c); Coalition for the Preservation of Hispanic Broad-

casting v. FCC, No. 87-1285, slip op. at 9 (D.C. Cir. April 23, 1991) (in seeking relief before the FCC, litigants should take the "earliest available corrective step"). In any event, we note that whether or not the language of the certification could serve as the basis for a perjury conviction is irrelevant to the ability of the Commission to dismiss an application pursuant to its rules for failure to comply with the certification requirement. In this regard, neither 18 U.S.C. Section 1621 (2) nor 28 U.S.C. Section 1746 states (or even suggests) that na agency certification requirement would be unenforceable by the agency simply because it might not sustain a perjury conviction. Moreover, Sun does not even claim to have relied on the alleged deficiencies in the language of the certification as a basis for its failure to sign the certification.

8. Accordingly, IT IS ORDERED that the "Second Petition for Further Reconsideration" filed June 7, 1990, by Sun Communications, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

FOOTNOTES

(1) The Bureau referred Sun's filing to the Commission pusuant to 47 C.F.R. Section 1.106(1)(1).

(2) See, e.g., U.S. v. Sweig, 441 F.2d 114 (2d Cir. 1971), cert. dinied, 403 U.S. 932 (1971).

Before the

Federal Communications Commission

Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS INC.

File No. 1032-CL-P-581-A-88

For construction authority to establish a new cellular system to operate on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the North Dakota 2-Bottineau Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted; April 27, 1990

Released: May 7, 1990

By the Chief, Common Carrier Bureau:

I. BACKGROUND AND CONTENTIONS

1. Sun Communications, Inc. (Sun) won the non-wireline lottery for the North Dakota 2-Bottineau Rural Service Area (RSA). The Mobile Services Division (MSD) dismissed Sun's application as unacceptable for filing because Sun failed to submit a full-size 1:250,000 scale map as required by Section 22.903(a) of the Commission's Rule. In Sun Communications, Inc., 4 FCC Rcd 6429 (Com. Car. Bur. 1989) (Bureau Order), the Common Carrier Bureau determined that since Sun's 1:500,000 scale map submitted after the lottery with its paper orignial application was legible, with clear latitude, longitude, and scale markings depicited on its face, the improper map scale did not render the

application unacceptable for filing under Section 22.20 of the Rules.

2. After this decision was reached, the Bureau would have ordinarily reinstated Sun's application and allowed it to file a minor amendment to its appliction, submitting a full-size map with a scale of 1:250,000. Nevertheless, the Bureau Order dismissed Sun's application because Sun had not signed the certification statement printed on the transmittal sheet filed with its initial (microfiche) application. Thus, Sun's application was dismissed for failure to comply with the COmmission's "letter perfect" standard.

3. Sun has filed a petition for further reconsideration or for waiver of the Commission's Rules in which it requests that the Bureau either reinstate its application or waive the certification requirement. Sun notes that the transmittal sheet has all the identifying data neces-

sary to log in and process Sun's application except for a signature on the certification statement. Further, Sun observes, its application was properly signed and certified on FCC Form 401, page 2, Schedule A, by Sun's President, and the missing signature was not discovered until after the lottery in the relevant market had been held. In this regard, Sun contends, the "letter perfect" standard was developed to help expedite the provision of cellular services to the public by expediting the processing of cellular applications. The certification as to the completeness of cellular applications was originally required to be the first page of each application so that intake processors did not have to hunt through the aplication to satisfy themselves, at least preliminarily, of its completeness. Cellular Lottery Rules (Order on Further Reconsideration), 59 Rad.Reg.2d (P&F) 407,

410 (1985).

4. Sun stresses that, for RSA applications, the certification of completeness was removed from the first page of the application and placed on the transmittal sheet, which must be filed with the microfiche copies of an application. See Section 22.923(b)(7) of the Rules. Sun claims that this change further established the transmittal sheet's limited role as an inital processing tool to save staff time, not as a post-lottery tool to review an application. Sun argues that to reason otherwise would render meaningless the required signature on FCC Form 401, Schedule A, page 2, and all the sworn answers which precede it. The foregoing signature is part of a certification that the statements made in the application are "true, complete and correct to the best of his (her) knowledge and belief, and are made in good faith." Sun contends that

since its transmittal sheet provided the data necessary for preliminary processing and its application was included in the lottery, the transmittal sheet has served its purpose and cannot be the basis for post-lottery dismissal of its application. In sum, Sun argues that because the certification blank for RSA applications is now contained in the transmittal sheet, and not in the application, it is no longer subject to additional review by the Commission after the initial intake stage.

5. Moreover, Sun argues that the circumstances in this case warrant a waiver of the certification requirement and reinstatement of Sun's application. Sun notes that the Commission may grant a waiver under Section 22.19 of the Commission's Rules when the underlying purpose of the rule would not be served or would be frustrated by applying the rule in a particular case or when the unique

facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Sun argues that the principal purpose of the certification requirement was to help expedite the processing of RSA applications. Sun contends that since the lack of a signature on the transmittal sheet did not interfere with the prompt processing of Sun's application, the goal of the certification requirement has been fulfilled. Further, Sun observes, if the Commission were not to grant a waiver of the rule, another lottery would have to be conducted and another application would have to be received and examined, all of which would frustrate the purpose of the rule, namely, expeditious processing of RSA applications and expeditious provision of cellular services to the public. Lastly, Sun contends that there are other unique facts in

this case which justify waiver of the signature requirement. Sun notes that the Commission determined that Sun is qualified to be a Commission licensee when it granted Sun's application for authority to construct and operate the non-wireline cellular system for the New Mexico 5-Grant RSA. Sun claims that since both RSA applications contain the same legal and character disclosures, the Commission has already determined that Sun is legally qualified to be a Commission licensee, and has determined that Sun is not a speculative applicant.

II. DISCUSSION

6. The "letter perfect" standard requires each applicant for a cellular authorization to: sign a statement certifying to the completeness of its application, state the applicant's name, the

market name, market number and frequency block for which it is applying; and to provide two properly identified microfiche copies of its executed application at the time of filing. Johnstown Cellular Communications Co., 1 FCC Rcd 1164 (Com. Car. Bur. 1986; Jacksonville Cellular Telephone Company, 3 FCC Rcd 5386 (1988); Satellite Cellular Systems, 4 FCC Rcd 477 (Com. Car. Bur. 1989), app. for review denied, FCC 90-96 (released March 20, 1990). Applications which fail to meet the "letter perfect" standard are dismissed. See, e.g., Pactel Mobile Access, 1 FCC Rcd 564 (1986).

7. After having reviewed the arguments set forth in Sun's petition, we find that it has failed to present any convincing reasons for the reinstatement of its application or for the waiver of the requirement that the certification on the transmittal sheet be signed. Sun has

clearly failed to comply with one of the "letter perfect" requirements in that it did not certify as to the completeness of its application by signing the certification statement on its transmittal sheet. Persons filing applications for initial cellular systems in the RSAs are required to file the transmittal sheet with two microfiche copies of the application. The transmittal sheet, which includes the certification of completeness, is an essential part of each RSA applicant's initial filing. By signing the certification statement on the transmittal sheet, an RSA applicant cerifies, under penalties of perjury, that the application "is complete in every resepect and contains all of the information required by FCC Form 401 and the Commission's cellular application rules." 47 C.F.R. Section. 22.923(b)(7). This special certification is used as a replacement for the time-consuming

prescreening of applications which was previously conducted by the Commission's staff at the initial intake stage. This certification is required to be made pursuant to Section 22.923(b)(7) of the Rules, 47 C.F.R. Sec. 22.923(b)(7).

8. The fact that Sun's application was not dismissed prior to the lottery did not prohibit the Bureau from dismissing that application at a later date when the applicant's fatal error was discovered. As the Bureau Order held, failure to comply with any of the "letter perfect" requirements results in the dismissal of the application, no matter when the defect is discovered. See, Satellite Cellular Systems, FCC 90-96 (released March 20, 1990). See also, Central Illinois Celllular Limited Partnership, 2 FCC Rcd 436, 437 (Com. Car. Bur. 1987). Section 22.26(b) of our Rules, 47 C.F.R. Section 22.26(b) explains that acceptance of an

application for filing merely means that it has been the subject of preliminary review as to completeness and does not preclude the subsequent return or dismissal of the application if it is found to be defective. Moreover, there is a sound policy basis for applying the letter perfect requirement post-lottery. Because Sun's transmittal sheet did not contain the appropriate certification required by the "letter perfect" rule, Sun provided no assurance that its application had been reviewed by it for completeness. Without such assurance on the transmittal sheet, the Commission's staff would have to engage in the time-consuming process of reviewing all RSA microfiched applications to determine whether those applications are acceptable for filing pursuant to Section 309(i) of the Communications Act.[1] See Cellular Lottery Rules (Order on Further Reconsideration), 59 Rad. Reg. 2d

(P&F) 407, 409-10 (1985). Thus, the Bureau properly held that Sun's application was unacceptable for filing and should never have been included in the lottery which it won. In this light, Commission precedent holds that Sun's application must be dismissed and another lottery must be conducted among applicants who have met the "letter perfect" standard.

9. Further, Sun has not presented sufficient grounds to waive the certification requirement of the "letter perfect" standard. First, the staff's finding that Sun was fully qualified to construct and operate the non-wireline system in the New Mexico 5-Grant RSA is not relevant to our review of Sun's North Dakota 2-Bottineau application. The fact that Sun met all of our cellular requirements for the New Mexico RSA does not mean that its application for the North Dakota 2-Bottineau RSA

was complete or correct at the time it was filed. Second, Sun has not demonstrated that the underlying purpose of the certification requirement will not be served by its application in this case, or that the facts of this case justify waiver.[2] As noted in paragraph 7 supra, the certification requirement was adopted to replace the previous pre-screening procedures by which the processing staff determined whether applications were minimally acceptable for inclusion in relevant lotteries pursuant to the directives of Section 309(i) of the Communications Act. This certification requirement ensures that processing is not delayed through lengthy pre-screening of numerous applications and is directly related to the Commission's goal of speeding service to the public. Sun has presented no unique facts to distinguish itself from any other applicant who fails to submit a signed

certification, or which would otherwise render inequitable the application of the letter perfect standard in this case. Grant of a waiver herein would necessitate a similar waiver to any applicant who does not submit a signed certification, and would greatly increase staff processing time. Therefore, we conclude that Sun has failed to demonstrate that the purpose behind the certification requirement, expeditious service to the public, would be frustrated by its application in this case.

10. Accordingly, IT IS ORDERED that the petition for further reconsideration or for waiver of the Commission's Rules filed by Sun Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

(1) The initial processing staff reviewed only the transmittal sheet and the microfiche envelope to determine whether the application contained sufficient information for processing. The certification was moved from the application to the transmittal sheet precisely because it would be burdensome for the staff performing the inital screening function to look at the microfiche copies of every application to determine acceptability for filing. Sun's argument that the certification which appears at the end of Schedule A, page 2, Form 401 should suffice in this case is unavailing. That certification is a general statement that statements made in the application are "true, complete and correct to the best of his (her) knowledge and belief, and are made in good faith." The basic purpose of

the certification is to verify the truthfulness of statements in the application. In contrast, the certification as to completeness contained on the transmittal sheet has the purpose of verifying that the applicant in question has reviewed the application and that it is complete in every respect, that the applicant intends to build its proposed system and that it is the real party in interest behind its application.

(2) See Section 22.19 of the Rules.

Before the

Federal Communications Commission

Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS, INC.

File No. 10232-CL-P-581-A-88

For construction authority to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve the North Dakota 2- Bottineau Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: August 8, 1989;

Released: August 17, 1989

By the Chief, Common Carrier Bureau

1. Sun Communications, Inc. (Sun) won the non-wireline lottery for the North Dakota 2-Bottineau Rural Service Area (RSA). By letter dated May 2, 1989, the Mobile Services Division (MSD) dismissed Sun's application as unacceptable for filing (1) because Sun failed to submit a full-size 1:250,000 scale map as required by Section 22.903(a) of the Commission's Rules.(2) Sun has filed a petition for reconsideration, and a supplement to that petition, in which it seeks reinstatement of its application. No opposition pleadings have been filed. We conclude that Sun's application should not have been dismissed solely because it failed to submit a map drawn to the required scale. Nevertheless, we have discovered another defect in the application which requires its dismissal.

I. SUN'S CONTENTIONS

2. Sun claims that there is a conflict between two Commission Rules as to what scale map should be submitted by cellular radio applicants. Sun alleges that this rule conflict has confused applicants, and therefore an applicant which files a map complying with one of these rules should be allowed to amend its application to provide the correct scale map. Sun observes that Section 22.923(a)(1) of the Rules provides that the map exhibit in a cellular application shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map depicting the complete RSA and any Cellular Geographic Service Areas (CGSAs) for which the application has been filed. (3) Notwithstanding, Sun admits, Section 22.903(a)(1) of the Rules, which focuses

on the filing of initial cellular applications for the RSAs, states that each CGSA must be drawn on one or more U.S. Geographical Survey Map(s) with a scale of 1:250,000. Sun asserts that its filing of a full-size map with a scale of 1:500,000 is consistent with its use of the same scale map for producing the reduced copy of its full scale map that was contained in the microfiched application that it initially filed. Lastly, Sun argues that it should be allowed to supplement its application by filing a minor, informational amendment which includes a map drawn to the 1:250,000 scale.

II. DISCUSSION

3. In its First Report and Order, Amendment of the Commission's Rules for Rural Cellular Service, 60 Rad.Reg.2d (P&F) 1029, 1037 (1986), the Commission

determined that the public interest would be served by generally adhering to the application procedures prescribed for MSA markets 121-305 when processing RSA applications. The Commission, in so holding, stated that adoption of these rules would ensure that cellular service was provided to rural America on an expedited basis. Id. at 1040-41. Furthermore, in Cellular Lottery Reconsideration Order, 101 F.C.C. 2d 577, 604 (1985), the Commission indicated that these lottery selection procedures were being adopted to streamline the licensing process by reducing the incentive for applicants to file "sham" or speculative applications. In its Cellular Lottery Further Reconsideration Order, 59 Rad.Reg.2d (P&F) 407, 410 at n.16 (1985), the Commission established the "letter perfect" condition. Failure to adhere to this standard would result in an application being dismissed as unaccep-

table for filing. Only the information required for pre-screening prior to the lottery is subject to the letter perfect standard. See, e.g., Timothy Roper, 4 FCC Rcd 4070 (1989). Even though an application may have satisfied the "letter perfect" standard and passed through the initial intake stage for processing cellular applications, defects may still be found which would render the application defective and unacceptable for filing, thereby leading to its dismissal. REM Communication, 3 FCC Rcd 3705 (1988).

4. Section 22.20(a)(1) of the Commission's Rules states that an application will be unacceptable for filing if, inter alia, the application is defective with respect to completeness of answers to questions or informational showings. Section 22.20(a)(2) of the Rules provides that an application will be deemed unac-

ceptable for filing if the application does not comply with the Commission's Rules, regulations, or specific requirements for additional information. An application which is unacceptable for filing is returned to the applicant. Nevertheless, minor errors in an application that has been found acceptable for filing may be corrected by amendment. See, e.g., Timothy Roper, 4 FCC Rcd 4070 (1989). In the case of a cellular application, amendments to the tentative selectee's application cannot be filed until after the lottery has occurred. See Section 22.918(b) of the Rules. Moreover, a defective cellular application may not be amended after the filing date or after the lottery to bring it into compliance with the Commission's Rules. See REM Communication, 3 FCC Rcd 3705 (1988) (REM).

5. First, we must decide whether Sun's

submission of a 1:500,000 scale map with its paper application is consistent with the Rules. At the outset, we observe that Section 22.923(b) of the Commission's Rules requires applicants seeking authority for initial systems to file two microfiche copies of their applications with the Commission. Along with the microfiche copies of the application, applicants are required to submit a reduced copy of a 1:250,000 or 1:500,000 scale map depicting the complete RSA and all SGSA(s) therein. See Section 22.923(a)(1) of the Rules. After the Commission holds a lottery to determine which applicant for a particular frequency block (A for non-wireline, B for wireline) in a particular RSA is the winner, the applicant selected first in the lottery must file the original and two paper copies of its application with the Commission. At issue here is whether the Rules require an ap-

plicant to submit, with the original and two paper copies, an exhibit including a map depicting the CGSA on a scale of 1:250,000. See Sections 22.903(a)(1) and 22.923(a)(1) of the Rules.

6. We do not perceive any conflict between the provisions of Sections 22.903(a)(1) and 22.923(a)(1) of the Commission Rules and therefore reject Sun's contentions in this regard. Sections 22.903(a)(1) (4) and 22.923(a)(1) (5) clearly require RSA applicants to submit maps on a scale of 1:250,000 with the paper application. Section 22.903(a)(1) requires that the applicant draw its CGSA on a U.S. Geological Survey map with a scale of 1:250,000. Additionally, the applicant must depict each base station site within each CGSA and the respective 39 dBu contours of those base stations, but need not depict the entire RSA. Section

22.923(a)(1), which prescribes the content and form of RSA applications, specifically directs each applicant to include as an exhibit to its application a map of the proposed CGSA. The rule states that: "This exhibit shall contain all the information specified in Section 22.903(a)(1)." Thus, Section 22.923(a)(1) incorporates by reference the requirements of Section 22.903(a)(1). In addition, Section 22.923(a)(1) requires that the exhibit "shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map, depicting the complete RSA and CGSA(s) therein." (Boundaries of the RSA, CGSA(s) and 30 dBu contours must also be clearly indicated.) We allow the use of the 1:500,000 scale map for the reduced copy of the map because RSAs cover broad geographic areas and it would be difficult to show some of the RSAs on a map drawn to a 1:250,000 scale.

7. In contrast, we require the submission of an actual 1:250,000 scale map with the paper application so that each CGSA can be depicted in sufficient detail that our engineering staff can process the relevant application after the lottery has occurred. In instructing applicants on the filing procedures for these maps, Section 22.923(a)(1) provides that: "The full-size map need not be included in the microfiche copies of the application, but must be present in the original application from which the microfiche is made. For microfiching purposes the reduced map is sufficient." Given that Section 22.923(a)(1) requires the submission of two maps, with the submission of the reduced map being sufficient for microfiching purposes, the phrase "full-size map" logically refers to the 1:250,000 scale map, not the reduced map which may be prepared on a scale of

1:500,000. Thus, Sun's submission of a 1:500,000 scale map with its paper original application is not consistent with the Rules.

8. Second, we must consider whether, given Sun's noncompliance with the rules, dismissal of its application is warranted. The commission has issued several decisions with respect to the acceptability of filing of applications containing defective maps. In REM, supra, the Commission dismissed an application pursuant to Section 22.20 of the Rules as unacceptable for filing because the map submitted by the applicant was illegible and failed to provide clear latitude, longitude or scale markings. The Commission held that such a map prevents the application from being processed and reviewed by staff engineers. In REM, the Commission cited its Order on Reconsideration in Petitions for Recon-

sideration of the Return of Round IV Cellular Applications for Having Defective Maps, FCC 86-37 (released January 24, 1986) (Round IV Maps), in which one application was dismissed for failure to include a map of the required scale (6) and another group of applications was dismissed for failure to indicate latitude and longitude markings on their maps. The Commission in REM, supra, distinguished its decision in U.S. West NewVector, 2 FCC Rcd 543 (1987) (NewVector), in which the Commission reversed an MSD order dismissing an application because the scale was not printed on the face of the map. In NewVector, the Commission deemed dismissal of the application to be "unduly harsh" because the map scale was referenced elsewhere in the application and the staff engineers were still able to evaluate the applicant's engineering proposal. In Timothy Donald Engelgau, 2 FCC Rcd 543

(1987) (Engelegau), aff'd sub nom. Queen City Cellular Communications v. F.C.C., 859 F.2d 241 (D.C.Cir. 1988), the Commission upheld the grant of an application which was filed with a map on a scale of 1:500,000. The application in question had included a request for waiver of Sections 22.903(a) and 22.913(a)(2) of the Rules, which required the submission of a map with a scale of 1:250,000. The basis for the waiver request was that the applicant could not obtain the correct scale map from the U.S. Geological Survey. When Engelgau filed his Section 1.65 amendment to his application, he submitted the map with the proper scale, which was accepted by the processing staff.

9. Sun's map submitted with its paper original application on the 1:500,000 scale was legible, with clear latitude, longitude and scale markings depicted on

the face of the map.(7) The scale of the map, while not the optimum for processing purposes, does not, by itself, prevent the staff from processing the application. Thus, we conclude that the improper map scale constitutes a minor defect in Sun's application, which does not render the application unacceptable for filing under Section 22.20 of the Rules. Under the facts of this case, an amendment submitting a map on a scale of 1:250,000 would be a minor amendment, as allowed by Section 22.918(b) of the Rules. The 1:250,000 scale map submitted by Sun as a Section 1.65 amendment depicts the identical proposed service area and site locations as the map with a scale of 1:500,000 and there are no engineering changes or adjustments to the CGSA. The Commission's decisions in REM and Round IV Maps are clearly distinguishable because the maps in those cases could not be used by the

staff to process the applications. In light of the foregoing, we conclude that the MSD should not have dismissed Sun's application based solely upon the filing of a 1:500,000 scale map. (8)

10. We would ordinarily reinstate Sun's application and allow it to file a minor amendment to its application, submitting a full size map with a scale of 1:250,000 if no other fatally defective error were present. Our review of Sun's application in the context of Sun's petition for reconsideration reveals that Sun's application should have been dismissed because Sun did not sign the certification statement printed on the transmittal sheet filed with its initial application. The Transmittal Sheet is provided by the Commission and contains a printed certification statement which must be signed by the authorized representative of each ap-

plicant. See Section 22.923(b) of the Rules. By signing the certification statement, an applicant certifies that its application is complete in every respect and that the applicant is the only real party in interest to the application.

11. Thus, we must dismiss Sun's application at this time for failure to comply with the Commission's "letter perfect" standard. The "letter perfect" standard applies to certain specified pre-lottery filing requirements. Thus, each applicant for a cellular authorization is required to certify to the completeness of its application, state the applicant's name and the market name, market number and frequency block for which it is applying, and to provide two properly identified microfiche copies of its executed application at the time of filing. Johnstown Cellular Communications

Co., 1 FCC Rcd 1164 (Com.Car. Bur. 1986) aff'd, Jacksonville Cellular Telephone Company, 3 FCC Rcd 5386 (1988); Timothy Roper, 4 FCC Rcd 4070 (1989). See also Satellite Cellular Systems, 4 FCC Rcd 4477 (Com.Car.Bur. 1989). Failure to comply with any of the "letter perfect" requirements results in the dismissal of the relevant application, no matter when the defect is discovered. See, e.g., Central Illinois Cellular Limited Partnership, 2 FCC Rcd 436, 437 (Com. Car. Bur. 1987) and Section 22.26 of the Commission's Rules. This kind of defect cannot be cured by amendment. See, e.g., Midwest Mobilephone of Michigan, Inc 3 FCC Rcd 3933, 3934 (1988). Section 22.923(b)(7) of the Commission's Rules provides the precise language for the statement to which each cellular applicant for an RSA must certify and specifically requires that a cellular applicant must certify to the contents of

that statement by signing the statement and printing the name and title of the person signing the statement. Although Sun provided the name of its President and his title, the certification statement was not signed. In this light, Sun's application has clearly failed the "letter perfect" standard and must be dismissed as unacceptable for filing. See, e.g., Clyde W. Pierce, 4 FCC Rcd 2378 (1989) (application dismissed as defective for failure to properly sign and certify the application).

12. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Sun Communications, Inc. IS GRANTED to the extent indicated herein and IS DENIED in all other respects and the MSD's dismissal of Sun's application IS AFFIRMED for the reasons set forth herein.

Gerald Brock

Chief, Common Carrier Bureau

FOOTNOTES

(1) Section 22.20 of the Commission's Rules explains that a defective application may be dismissed as unacceptable for filing.

(2) The MSD letter also observed that Sun's application might be defective for other reasons, but in an effort to best utilize the MSD's limited resources, once an application has been found unacceptable for filing for one reason, the processing of that application ceases.

(3) Section 22.903(a) of the Rules states

that the CGSA of a celluar system shall be defined by the applicant as the area intended to be served. Section 22.903(a)(1) explains that an applicant may propose multiple CGSAs within an RSA.

(4) Section 22.903(a)(1) states, in pertinent part:

. . . The CGSA must be drawn on one or more U.S.Geological Survey map(s) with a scale of 1:250,000.

(5) Section 22.293(a)(1) states, in pertinent part:

This exhibit shall contain all the information specified in Section 22.903(a)(1). In addition, this exhibit shall include an 8 1/2 by 11 inch reduced copy of a 1:250,000 or 1:500,000 scale map, depicting the complete RSA and any CGSA(s)

therein . . . The full-size map need not be included in the microfiche copies of the application from which the microfiche is made. For microfiching purposes, the reduced map is sufficient.

(6) The application in question was filed by Celcom, Inc. The Commission stated that the map was significantly smaller than that prescribed, "rendering engineering calculations on the submitted map virtually impossible."

(7) Section 22.2 of the Rules defines a map as follows:

Maps. A representation on a flat surface of a part of the whole of the earth's surface. All maps submitted under this part shall include latitude, longitude and scale. (Emphasis added.)

(8) We should note, however, that while a 1:500,000 scale map is usable for processing purposes, a smaller scale map may not be and may render the application patently defective. See Round IV Maps, slip op. at para.4.

United States Court of Appeals

For the District of Columbia Circuit

No. 91-1548 September Term, 1992

Filed October 16, 1992

Ron Garvin, Clerk

Sun Communications, Inc.

Petitioner

v.

Federal Communications Commission and

United States of America,

Respondents

BEFORE: Wald, Silberman and Randolph,

Circuit Judges

O R D E R

Upon consideration of petitioner's petition for rehearing, filed September 14, 1992 it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT

RON GARVIN, CLERK

BY:

Robert A. Bonner

Deputy Clerk